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Supreme Court, U.S.
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No. 95-491

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

LOREN LOVING VAIL,
Petitioner,

vs.

THE PLAIN DEALER PUBLISHING COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court may review a decision of the Supreme Court of Ohio that rests upon adequate and independent state grounds.

2. Whether this Court may review a state court judgment to address purported federal claims which the petitioner failed to raise in the state courts below and which those courts did not independently address.

3. Whether this Court may review a state court judgment to address insubstantial federal claims.

COUNTER-STATEMENT OF THE PARTIES TO THE PROCEEDING

Petitioner Vail was a candidate for the 25th District seat in the Ohio Senate in the November 1990 general election. The 25th District encompasses portions of eastern Cuyahoga County, Ohio.

Respondent Plain Dealer Publishing Company publishes *The Plain Dealer*, a metropolitan newspaper circulated daily to the general public in Cuyahoga County and elsewhere.

The remaining two respondents are Joe Dirck, a Plain Dealer columnist, and Thomas Greer, Vice President and Senior Editor for the Plain Dealer.

RULE 29.1 LISTING

The Plain Dealer Publishing Company has no publicly traded parent or subsidiary.

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COUNTER-STATEMENT ON JURISDICTION

This Court lacks jurisdiction under Article III of the United States Constitution because the Ohio Supreme Court expressly decided the case on independent and adequate state constitutional grounds. The Court also lacks jurisdiction because the petitioner did not raise her purported federal claims in the state courts below, nor did those courts address those claims, and because those claims are not substantial federal questions as required under 28 U.S.C. § 1257.

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RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to 28 U.S.C. § 1257 set forth by petitioner, the following are involved:

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be

made, under their Authority, ... to Controversies ... between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article I, Section 11 of the Ohio Constitution provides:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

COUNTER-STATEMENT OF THE CASE AND FACTS

Petitioner Loren Loving Vail filed this suit in the Cuyahoga County Court of Common Pleas on July 18, 1991. Vail sued the Plain Dealer Publishing Company, and two Plain Dealer employees, Joseph Dirck and Thomas Greer (collectively, "the Plain Dealer"), for libel and infliction of emotional distress over a newspaper column written by Dirck and published on October 19, 1990.

In his regular column, Dirck, a political commentator, criticized Vail's campaign for election to the Ohio Senate. His October 19 column appeared a few weeks before the upcoming election. Vail was an outspoken advocate of "family values" during her campaign, and had criticized the Gay People's Chronicle and the social views of its editor. Dirck contrasted the statements in Vail's press releases castigating the Gay People's Chronicle with Vail's later denials that she had adopted "gay bashing" as a campaign tactic.

Vail has sued over Dirck's criticism. Vail does not claim that Dirck quoted her press releases inaccurately, or that Dirck inaccurately reported that, in an interview at the Plain Dealer, she denied attacking gays during her political campaign.

Contrary to the representation in her petition, Vail's complaint lists only the following characterizations by Dirck as actionable: "Gay-Basher," "neo-numbskull," "hate-mongering," and "bigot."[1] (Complaint ¶ 8.) A copy of Vail's complaint, including the press releases she attached to her complaint, are in the appendix to this brief.

REASONS WHY THIS COURT SHOULD DENY THE PETITION

I. This Court Has No Jurisdiction To Review The Judgment Of The Ohio Supreme Court Because It Rests Upon Ohio Law, Not Federal Law.

A. This Court Will Not Review State Court Judgments Which Rest Upon Independent And Adequate State Law Grounds.

The petitioner bears the burden of establishing the jurisdiction of this Court. *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983).

This Court has no jurisdiction to review judgments of state courts that rest upon adequate and independent state law grounds. *Coleman v. Thompson*, 501 U.S. 722, 729, 740

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[1] She also claimed that Dirck characterized her as a liar, but the column does not contain that characterization.

(1991); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

This Court can review only issues of federal law. It cannot change a state court's construction of state law. *Coleman*, 501 U.S. at 729; *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). Thus, state courts are free "to develop state jurisprudence unimpeded by federal interference" and they are "`unfettered . . . in interpreting their state constitutions.'" *Long*, 463 U.S. at 1041 (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940)).

Indeed, state courts are free to decide that state constitutions provide more expansive safeguards of individual liberties than those provided by the federal bill of rights. This Court has stated:

> [S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.

Arizona v. Evans, 514 U.S. ___, 131 L.Ed.2d 34, 42 (1995); *accord PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (free speech); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); *Cooper v. California*, 386 U.S. 58, 62 (1967).

The bar to this Court's review of state court construction of state law arises in part from the separation of sovereign powers between each of the states and the United States. *Long*, 463 U.S. at 1041 *see Coleman*, 501 U.S. at 726.

That bar also arises from the case or controversy limitation of federal jurisdiction in Article III, § 2 of the United States Constitution. If the same judgment would be rendered by a state court construing state law after review by this Court o any perceived federal question, then this Court's ruling would be advisory only. As an advisory opinion, it would violate Article III, § 2. Thus, any resolution by this Court of federal law must control the outcome of the case. *Coleman*, 501 U.S. at 729; *Herb*, 324 U.S. at 125-126; *Muskrat v. United States*, 219 U.S. 346, 359-63 (1911).

B. The *Michigan v. Long* Presumption Of Federal Grounds For Review Of State Court Judgments Applies In Only Limited Circumstances.

In arguing for this Court's jurisdiction, petitioner relies exclusively on *Michigan v. Long*, 463 U.S. 1032. In *Long*, this Court ruled that it will presume federal grounds for review of state court decisions under limited circumstances. The Court stated:

> [W]hen...a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

463 U.S. at 1040-1041.

The *Long* presumption of jurisdiction requires "a clear indication that a state court rested its decision on federal

law." The presumption does not apply where the state court decision "does not fairly appear to rest primarily on federal law" or to be "interwoven" with federal law. *Coleman*, 501 U.S. at 735, 739-740.

Furthermore, the *Long* presumption applies only where state court decisions are at least "ambiguous" because they expressly refer to both state and federal law, making it "unclear from such opinions whether the state law decision is independent of federal law." *Coleman*, 501 U.S. at 732, 733, 734; *see Long*, 463 U.S. at 1038 n.4; *Harris v. Reed*, 489 U.S. 255, 257-258 (1989).

Only where it appears that the state court understood federal law to "compel" the state court's judgment does this Court engage in the presumption of jurisdiction. *Long*, 463 U.S. at 1041, see 1038 n.4, 1042-1043 n.8, 1044.

Whether a state court judgment rests primarily upon federal grounds is determined "from the four corners" or "face" of the state court's opinion. *Long*, 463 U.S. 1040-1041.

C. A State Court Can Avoid A *Michigan v. Long* Presumption By Including In Its Opinion A Plain Statement That Its Judgment Rests On Adequate State Grounds That Are Independent Of Federal Law.

Even where the predicate for the *Long* presumption of federal jurisdiction appears in a state court opinion, a state court defeats the presumption by including a "plain statement" that the judgment "rests upon adequate and independent state

grounds." *Long*, 463 U.S. at 1042, see 1041 & n.7, 1044; *see Coleman*, 501 U.S. at 733.

The "plain statement" does not require a mechanical incantation of specific words. This Court explained:

> We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case....

Coleman, 501 U.S. at 739.

A "plain statement" is sufficient where the state court's opinion indicates that its judgment rests on state law grounds that are in some way independent from the state court's interpretation of federal law, or otherwise indicates that federal law did not "compel" the result. *Long*, 463 U.S. at 1041, 1044; *Arizona*, 514 U.S. at ___, 131 L.Ed.2d at 43; *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (state supreme court is free to rest its holding on the state constitution and to divorce the state constitutional issue from questions of federal law).

D. Ohio Law, Not Federal Law, Controlled The Judgment Of The Ohio Supreme Court In *Vail*.

Michigan v. Long does not authorize this Court's review of the Ohio Supreme Court's judgment in *Vail*. The predicate for the *Long* presumption is not present here because the *Vail* decision did not apply federal law and thus does not contain the ambiguity necessary to trigger the presumption. Also, the *Vail* decision contains numerous plain statements that the

Ohio Constitution controlled the court's ruling, and that the scope of the free speech/free press guarantee of the Ohio Constitution does not depend on the scope of the First Amendment as construed by this Court. Indeed, the *Vail* court expressly rejected federal law as controlling its judgment or its interpretation of the Ohio Constitution.

Both the syllabus and majority opinion in *Vail* demonstrate that the decision does not activate the *Long* presumption.

The "controlling point of law" of the *Vail* court's decision is in its syllabus. *Akers v. Serv-A-Portion, Inc.*, 31 Ohio St. 3d 78, 79 n.1, 508 N.E.2d 964, 965 n.1 (1987); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. __, 131 L.Ed.2d 820, 825 (1995). The *Vail* syllabus makes no mention of federal law, but expressly applies "the Ohio Constitution." Six of the seven justices concurred in the syllabus, which states:

> When determining whether speech is protected opinion a court must consider the totality of the circumstances. Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared. (*Scott v. News-Herald* [1986], 25 Ohio St. 3d 243, 496 N.E.2d 699, approved and followed; Section 11, Article I of the Ohio Constitution, applied.)

72 Ohio St. 3d at 279, 649 N.E.2d at 183.

The majority opinion in *Vail*, written by the Chief Justice and in which all but one justice concurred, also does not purport to apply federal law. As in the syllabus, the majority opinion cites the Ohio Constitution and the Ohio Supreme

Court's earlier decision in *Scott v. News-Herald* as the only authorities which the court found to control its judgment. 72 Ohio St. 3d at 280-283, 649 N.E.2d at 184-186.

The *Scott* syllabus did not specify whether state or federal law controlled, and its 4-3 majority opinion cited both the Ohio Constitution and the First Amendment.[2] In *Vail*, however, the Ohio Supreme Court explained that the judgment in *Scott* was not compelled by the First Amendment. The court stated:

> Notwithstanding dicta stating the article was protected opinion under the First Amendment to the United States Constitution, our holding [in *Scott*] was premised on Section 11, Article I of the Ohio Constitution.

72 Ohio St. 3d at 281, 649 N.E.2d at 184.

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[2] The majority opinion stated: "We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution.... The federal Constitution has been construed to protect published opinions...." 25 Ohio St. 3d at 244, 496 N.E.2d at 701.

"These ideals are not only an integral part of First Amendment freedoms under the federal Constitution but are independently reinforced in Section 11, Article I of the Ohio Constitution...." 25 Ohio St. 3d at 245, 496 N.E.2d at 702.

"[I]t is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." 25 Ohio St. 3d at 254, 496 N.E.2d at 709.

The *Vail* court's firm statement that the First Amendment did not control *Scott* was in response to a query by this Court. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), this Court stated:

> [T]he *Scott* decision...was not clear on its face as to the court's intent to rely on independent state grounds, yet failed to make a "plain statement...that the federal cases...[did] not themselves compel the result that the court...reached."... We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.

497 U.S. at 12 n.5. The *Milkovich* litigation settled before the Ohio Supreme Court could respond to this Court's invitation. The Ohio Supreme Court responded in *Vail*.

Thus, the conditions upon which the *Long* presumption depends are absent in *Vail*. There is no ambiguity about whether federal law compelled the judgment because the Ohio Supreme Court did not cite to federal law. There is no "clear indication" that the Ohio Supreme Court "rested its decision on federal law," nor does the decision "fairly appear to rest primarily on federal law" or to be "interwoven" with federal law. *See Coleman*, 501 U.S. at 735, 739-740.

Moreover, the Ohio Supreme Court's decision is replete with plain statements of the court's reliance on state law.

In addition to plainly stating that *Scott* was based on state law, the *Vail* majority opinion plainly stated that "expressions of opinion are generally protected under Section 11, Article I of the Ohio Constitution" and that "the statements [at issue] are protected under Section 11, Article I of the Ohio

Constitution." 72 Ohio St. 3d at 280, 283, 649 N.E.2d at 184, 186.

The *Vail* syllabus plainly states that the Ohio Supreme Court applied "the Ohio Constitution." 72 Ohio St. 3d at 279, 649 N.E.2d at 183.

Not only did the Ohio Supreme Court state plainly and repeatedly that its judgment rested on the Ohio Constitution, it also emphasized the independence of that adequate state ground. In *Milkovich*, this Court ruled that the First Amendment did not protect the newspaper column that was at issue in *Scott*. Notwithstanding that ruling, the *Vail* court reaffirmed *Scott*. The *Vail* court stated:

> [In *Milkovich*], the United States Supreme Court reached a different conclusion from an application of the First Amendment to the United States Constitution than we had reached in *Scott* applying the Ohio Constitution.
>
> Regardless of the outcome in *Milkovich*, the law in this state is that embodied in *Scott*. The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press.

72 Ohio St. 3d at 281, 649 N.E.2d at 185.

Further underscoring the independence of Ohio's constitutional protection of opinion, the court stated that the Ohio Constitution "alter[s] the method of analysis" and "shifts" the focus of analysis as compared with First Amendment analysis. 72 Ohio St. 3d at 281-282, 649 N.E.2d at 185.

Justice Wright specially concurred in *Vail* to "stress" the majority opinion's "stated underpinnings--Section 11, Article I of the Ohio Constitution" and that "the protections accorded opinion under the Ohio Constitution are broader than the First Amendment jurisprudence developed by the United States Supreme Court." 72 Ohio St. 3d at 284, 649 N.E.2d at 187.

On its face, the Ohio Supreme Court based its entire decision in *Vail* on adequate state grounds independent of the First Amendment. Indeed, rather than ruling the way it did "because it believed that federal law required it to do so," the *Vail* court made clear that it ruled the way it did despite federal law and rejected *Milkovich* as controlling whether Ohioans enjoy a constitutional privilege to express an opinion. *See Long*, 463 U.S. at 1040-1041. The decision thus renders inapposite the presumption authorized by *Michigan v. Long* and precludes this Court's plenary review.

E. Petitioner's Arguments Fail To Establish This Court's Jurisdiction Under *Michigan v. Long*.

Petitioner's own statements refute her claim of this Court's jurisdiction. She admits that *Vail* made "clear that *Scott* was premised on the Ohio Constitution rather than on the federal Constitution" and that "the essence" of the *Vail* decision is that a privilege to express opinion "is the law in Ohio notwithstanding this Court's decision in *Milkovich*." (Pet. at 21.) Thus, petitioner admits that the judgment at issue rests on state grounds independent of federal law, precluding this Court's review.

Petitioner misportrays *Milkovich* as though this Court ruled irrefutably that the First Amendment controlled the judgment in *Scott*. (Pet. at 24, 28.) This Court actually ruled that *Scott*

was "not clear" on that point. The Court reviewed *Scott* by relying on the Court's *presumption* that federal law controlled, and afforded the Ohio Supreme Court the opportunity on remand to rebut the presumption. The Ohio court has now done so. 497 U.S. at 12 n.5.

Insisting nevertheless that this Court's interpretation of the First Amendment "controls the scope of the Ohio constitutional protections," petitioner asks this Court to read a host of decisions decided by the Ohio Supreme Court before it decided *Vail*. (Pet. 28, 22-24.)

The *Long* presumption, however, is designed to replace this Court's "unsatisfactory" practice of conducting "an independent investigation of state law." *Coleman*, 501 U.S. at 732. To "avoid the costs of excessive inquiry" the *Long* presumption focusses on "the face" and "four corners" of the state court opinion at issue. *Coleman*, 501 U.S. at 737; *Long*, 463 U.S. at 1040-1041, 1043 n.8. Thus, while relying exclusively on *Long*, petitioner asks this Court to engage in the kind of investigation which the Court eschewed in *Long* and which the presumption authorized by *Long* was supposed to replace.

Petitioner relies on selected prior rulings of the Ohio Supreme Court construing the Ohio Constitution, yet petitioner ignores the Ohio Supreme Court's admonitions that *stare decisis* does not impose "'petrifying rigidity'" or a "straitjacket" on the court's interpretation of the law, especially when construing the Ohio Constitution. *City of Rocky River v. State Employment Relations Bd.*, 43 Ohio St. 3d 1, 5-10, 539 N.E.2d 103, 106-111 (1989); *Clark v. Southview Hospital & Family Health Ctr*, 68 Ohio St. 3d 435, 438, 628 N.E.2d 46, 49 (1994); *Bonkowsky v. Bonkowsky*, 69

Ohio St. 2d 152, 154, 431 N.E.2d 998, 999 (1982), *cert. denied*, 457 U.S. 1135 (1982).

Moreover, petitioner mischaracterizes the prior rulings on which she relies. In three of the cases petitioner cites, the court expressly limited its decisions to the facts of those cases and left open the possibility that the Ohio Constitution would provide different protection than that provided by the First Amendment. In a fourth case, the Ohio Supreme Court merely affirmed a lower court's decision without opinion.

In *Eastwood Mall, Inc. v. Slanco*, the Ohio Supreme Court decided that the Ohio Constitution did not require a private owner of a shopping mall to permit picketing and the distribution of handbills on its property. The court was careful to limit its holding to "*the facts of this case.*" 68 Ohio St. 3d 221, 223, 626 N.E.2d 59, 61 (emphasis added), *cert. denied*, 130 L.Ed.2d 288 (1994). One of the justices wrote: "I am heartened by the fact that . . . [the court] has not foreclosed the possibility that Section 11, Article I may afford broader rights under other circumstances." 68 Ohio St. 3d at 228, 626 N.E.2d at 65 (Wright, J., dissenting).

In citing *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, petitioner relies exclusively on an "appendix" to the court's decision. The appendix is a court of appeals opinion that was affirmed without opinion by the Ohio Supreme Court. 63 Ohio St. 3d 354, 355, 588 N.E.2d 116, 118 (1992). The litigants in that case did not present the Ohio Supreme Court with authority that free speech protection under the Ohio Constitution is distinct from

protection under the First Amendment.[3] *Eastwood Mall, Inc.*, 68 Ohio St. 3d at 226, 626 N.E.2d at 63 (Wright, J., dissenting).

In *Zacchini v. Scripps-Howard Broadcasting Co.*, the court limited its ruling to "the record before us" and found that record to contain no "compelling" reason to conclude that the effects of the First Amendment were "significantly different" from the effects of the Ohio Constitution. 54 Ohio St. 2d 286, 288, 376 N.E.2d 582, 583 (1978).

Finally, *State v. Kassay*, decided over 60 years ago, opined erroneously that the First Amendment is "not applicable to the states."[4] 126 Ohio St. 177, 187, see 184, 184 N.E. 521, 525, see 524 (1932), *overruled in part on other grounds*, 131 Ohio St. 1, 1 N.E.2d 140 (1936). *Kassay* did not hold that the Ohio Constitution is inextricably linked to the First Amendment. It noted that "the Federal Bill of Rights upon the subject of the freedom of speech and of the press differs from Section 11 of the Ohio Bill of Rights." 126 Ohio St. at 184, 184 N.E. at 524.

In citing earlier Ohio decisions, petitioner omitted several which construed the Ohio Constitution as providing protection

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[3] In contrast, virtually the entire merits brief of the Plain Dealer filed in the Ohio Supreme Court in *Vail* relied upon Ohio's rich heritage of protecting expression of opinion before 1964, when this Court applied the First Amendment to state libel law. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[4] Seven years earlier, this Court stated that the First Amendment applies to the states. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

independent of that provided by the United States Constitution. *Painter v. Graley*, 70 Ohio St. 3d 377, 380, 639 N.E.2d 51, 54 (1994)[5]; *Arnold v. City of Cleveland*, 67 Ohio St. 3d 35, 41-42, 616 N.E.2d 163, 168-169 (1993) and paragraph one of syllabus[6]; *State v. Brown*, 63 Ohio St. 3d 349, 352, 588 N.E.2d 113, 115, *cert. denied*, 121 L.Ed.2d 127 (1992)[7]; *E.W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N.E.2d 896, *dismissed on other grounds*, 164 Ohio St. 261, 130 N.E.2d 701 (1955).[8]

Petitioner also overlooked the many Ohio decisions which protected expression of opinion (especially about political candidates) long before 1964, when this Court first applied the First Amendment to state libel law, and long before 1925,

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[5] (Federal cases construing the First Amendment are "of limited value in our interpretation of the Ohio Constitution, as '[t]he Ohio Constitution is a document of independent force.'")

[6] ("The Ohio Constitution is a document of independent force... As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.")

[7] (An Ohio court is not required to follow this Court's construction of the Fourth Amendment when construing the Ohio Constitution's identical prohibition of unreasonable search and seizure.)

[8] (The Ohio court of appeals recognized a right of the public to attend criminal trials under the Ohio Constitution twenty-five years before this Court recognized a similar constitutional right under the First Amendment in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

when this Court first applied the First Amendment to the states.[9] *E.g.*, *Tappan v. Wilson*, 7 Ohio 190, 192-93 (1835); *Cleveland Leader Printing Co. v. Nethersole*, 84 Ohio St. 118, 133-134, 137-140, 141 (1911); *Shallenberger v. Scripps Publishing Co.*, 20 Ohio Dec. 651 (C.P. Cuyahoga), *aff'd*, 42 Ohio Cir. Dec. 283 (1909), *aff'd*, 85 Ohio St. 492 (1912); *Hogan v. Forest City Publishing Co.*, 18 Ohio L. Abs. 127, 128 (1934); *McCarthy v. Cincinnati Enquirer*, 101 Ohio App. 297, 305-306, 136 N.E.2d 393, 399-340 (1956).

Petitioner also ignored some of the marked differences between the language of Ohio's constitutional free speech and free press guarantees and the language of the First Amendment. Section 11, Article I of the Ohio Constitution provides:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

Ohio's provision has two distinct clauses. The second clause prohibits governmental suppression of speech. Only that clause -- "no law shall be passed to restrain or abridge the liberty of speech, or of the press" -- corresponds to the First Amendment's language that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The first clause of Ohio's constitutional provision -- "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of

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[9] *New York Times Co.*, 376 U.S. 254 (1964); *Gitlow*, 268 U.S. at 666 (1925).

the right" -- has no counterpart in the text of the First Amendment. It affords an affirmative right of free speech, and even specifies the right to express "sentiments."

Thus, petitioner has failed to demonstrate that the result in *Vail* was compelled by the Ohio Supreme Court's understanding of federal law, or that the Ohio Constitution as construed in *Vail* is controlled by this Court's construction of the First Amendment. Accordingly, petitioner has failed to establish this Court's jurisdiction.

II. This Court May Not Review Petitioner's Purported Federal Claims Because Petitioner Did Not Raise Those Claims In The Ohio Courts, Nor Did The Ohio Courts Otherwise Address Them.

This Court will not review a state court judgment to decide constitutional questions that were not raised while the case was in the state court system, or addressed in the case by the state courts. *E.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *Clark v. Jeter*, 486 U.S. 456, 459-460 (1988); *Illinois v. Gates*, 462 U.S. 213, 218-221 (1983).

The bar to review is jurisdictional under 28 U.S.C. § 1257(a), which requires that substantial federal questions be "specially set up or claimed" while the case was in state court. *E.g.*, *Beck v. Washington*, 369 U.S. 541, 553 (1962); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334 (1968) (Harlan, J., dissenting).

In her petition here, petitioner raises for the first time the unprecedented notion that the First Amendment standards expressed in *Milkovich* "should be adopted as part of the constitutional federal common law of libel which no state

court may ignore." (Pet. at 31.) Despite state court litigation that has spanned nearly five years in three levels of the Ohio court system, petitioner has never before made that argument or anything like it. Nor has the notion described by petitioner been addressed independently by any of the Ohio courts below. Accordingly, this Court should not address it either.

Petitioner also argues for the first time that applying Ohio law to dismiss her libel claim abridges her "substantive right to due process under the Fourteenth Amendment." (Pet. 40.) That claim was neither raised by petitioner nor by any Ohio court while this case was in litigation for almost five years. This Court should not address it.

III. Petitioner's Purported Federal Claims Do Not Raise Substantial Federal Questions.

A. Petitioner's Claim That A "Federal Constitutional Common Law Of Libel" Bars State Constitutions From Protecting Speech Does Not Raise A Substantial Federal Question.

This Court should not consider petitioner's purported federal claims for the additional and independent reason that they are insubstantial. This Court will not consider alleged federal issues which already are well-settled or which do not raise weighty matters of federal law that need to be resolved. *See Zucht v. King*, 260 U.S. 174, 176 (1922); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

Petitioner argues for a "federal common law of libel which no state court may ignore," but there is no federal common law of libel. (Pet. at 31.) The Constitution does not empower federal courts "to declare substantive rules of common law

applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The Constitution does not "supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 334 (1986).

Protection of reputation is the domain of the states. Indeed, this Court has invited the states to "define for themselves the appropriate standard of liability" in libel cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

This Court has construed the First Amendment to "limit a State's power to award damages in a libel action." *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964). The First Amendment "supersedes the common law's presumptions" that lead to defamation liability and "reshape[s] the common-law landscape" to inhibit or bar liability. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774, 775 (1986).

Petitioner would transform the First Amendment standards limiting liability into standards which require liability. As an unprincipled notion contrary to all First Amendment jurisprudence, petitioner's assertion is not a substantial federal question.

B. Petitioner's Asserted Substantive Due Process Right Does Not Raise A Substantial Federal Question.

This Court has already rejected a substantive due process claim similar to that claimed by petitioner for the first time here. *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, the Court decided that the interest in reputation alone does not rise to

the level of "liberty" or "property" under the Due Process clause of the Fourteenth Amendment. 424 U.S. at 701, 712 (1976).

"Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert v. Gilley*, 500 U.S. 226, 233, 234 (1991).

In rejecting the notion that defamation coupled with state action amounts to a constitutional deprivation, this Court ruled that the Fourteenth Amendment is not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul*, 424 U.S. at 701.

Here, contrary to petitioner's exaggerated misportrayal of *Vail*, the Ohio Supreme Court did not abolish the tort of defamation. The court merely decided that the Ohio Constitution precludes recovery by petitioner under the circumstances of this case. Petitioner's purported, belated federal claim is insubstantial.

CONCLUSION

For the foregoing reasons, the petitioner has failed to sustain her burden of establishing this Court's jurisdiction to review the final judgment of the Ohio Supreme Court.

Therefore, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

David L. Marburger
(Counsel of Record)
Beth A. Brandon
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Attorneys for Respondents

APPENDIX

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

LOREN LOVING VAIL Berkshire Road Gates Mills, OH 44040 Plaintiff	:	CASE NO. 199678 JUDGE:
vs.	:	
THE PLAIN DEALER 1801 Superior Avenue Cleveland, OH 44114	:	
and	:	
JOE DIRCK c/o THE PLAIN DEALER 1801 Superior Avenue Cleveland, OH 44114	:	COMPLAINT JURY DEMAND ENDORSED HEREON
and	:	
THOMAS GREER, EDITOR c/o THE PLAIN DEALER 1801 Superior Avenue Cleveland, OH 44114 Defendants	:	

1. That at all time herein mentioned, Plaintiff was and now is, a resident of the City of Gates Mills, County of Cuyahoga, State of Ohio, and the Republican candidate of the Ohio 25th District Senate seat in the November 6, 1990, general elections.

2. That at all times hereinafter mentioned, Defendant THE PLAIN DEALER was, and still is a corporation duly

organized and existing under the laws of the State of Ohio, with its office and principal place of doing business at 1801 Superior Avenue, Cleveland, Ohio 44114, County of Cuyahoga, State of Ohio and was, and now is engaged in the business of printing, publishing and distributing a daily newspaper called THE PLAIN DEALER. This newspaper is circulated throughout Cuyahoga County and adjoining counties and is widely read.

3. That Defendant JOE DIRCK, a columnist for the PLAIN DEALER, conducted activity which gave rise to this claim in the County of Cuyahoga.

4. That Defendant THOMAS GREER, Editor of the PLAIN DEALER, conducted activity which gave rise to this claim in the County of Cuyahoga, and is an employee of Defendant newspaper, THE PLAIN DEALER.

COUNT ONE

5. Plaintiff reavers the allegations contained in Paragraphs 1 through 4 as if fully rewritten herein.

6. On October 19, 1990, Defendant newspaper published an article written by Defendant JOE DIRCK which is attached as Exhibit "A".

7. The article contained false statements and allegations concerning the Plaintiff which reflect upon her honesty and character in a defamatory manner bringing here into ridicule, hatred and contempt.

8. On October 19, 1990, at Page 5B of THE PLAIN DEALER, Defendant, Joe Dirck made statements and allegations concerning the Plaintiff. (See Exhibit "A"). Defendant Dirck called and accused the Plaintiff of being a "Gay-Basher", "neo-numbskull", "hate-mongering", a liar, and a bigot in response

to Plaintiff's press release which was never published. (See Exhibit "B"). Only selected portions of the release were pulled and used out of context to libel the Plaintiff. The Plaintiff's news release had never been published by the Defendant newspaper, nor anywhere else prior to Defendant Dirck's libelous allegations.

9. Said article was published with malice and reckless disregard for the truth with the intent to injure Plaintiff's reputation and campaign.

10. As a result Plaintiff has suffered mental anguish, ridicule, humiliation and great loss of reputation..

COUNT TWO

11. Plaintiff reavers the allegations contained in Paragraphs 1 through 10 as if fully rewritten herein.

12. That at all times relevant the Defendant THE PLAIN DEALER, was a "newspaper" within the meaning of O.R.C. Section 2739.11.

13. Defendant THE PLAIN DEALER, refused to print, publish and circulate a press release presented by Plaintiff setting forth in proper language the truth pertaining to the libelous statements of JOE DIRCK and THE PLAIN DEALER. (See Exhibit "B").

14. In an attempt to seek immediate redress, Plaintiff offered to purchase space in the Defendant's newspaper through its Advertising Director for the purpose of having the release published. This offer was denied. The reason given was that no explanatory letter (See Exhibit "C") would be permitted to accompany the release. This effectively denied the redress sought by the Plaintiff. (See Affidavit attached)

15. The refusal was in violation of O.R.C. Section 2739.11. Applicable by Section 2739.11.

COUNT THREE

16. Plaintiff reavers the allegations contained in Paragraphs 1 through 15 as if fully rewritten herein.

17. Defendants' wrote and published the defamatory statements with the intent to cause Plaintiff sever emotional distress, or with recklessness as to the effect of their conduct.

18. The acts of the Defendants amounted to extreme and outrageous conduct, beyond any First Amendment protection.

19. the conduct of the Defendants caused damage and injury to the Plaintiff, and her reputation, and she has suffered severe emotional distress.

COUNT FOUR

20. Plaintiff reavers the allegations contained in Paragraphs 1 through 18 as if fully rewritten herein.

21. Defendants' THE PLAIN DEALER and its employee THOMAS GREER and Defendant JOE DIRCK owed a duty of care to act reasonably toward the Plaintiff.

22. Defendants breached that duty of care by writing, publishing and circulating the defamatory statements of October 19, 1990. (See Exhibit "A" attached)

23. The Plaintiff has suffered injury to herself, and her reputation as a direct and proximate result of the conduct of the Defendants.

WHEREFORE. Plaintiff prays for the judgment against the Defendants jointly and severally in a sum of money damages that will fully and fairly compensate her as a result of the

publication of the libelous statements by the Defendants, the costs of this action, punitive damages and reasonable attorneys' fees.

LOREN LOVING VAIL, ESQ.
PHILLIP A. LAWRENCE, ESQ.
26 South Franklin St.,
P.O. Box 226
Chagrin Falls, OH 44022
(216) 247-8933

JURY DEMAND

A trial by Jury is requested hereon.

LOREN LOVING VAIL, ESQ.
PHILLIP A. LAWRENCE, ESQ.

EXHIBIT A

[The Plain Dealer; October 19, 1990]

JOE DIRCK, COMMENTARY

Gay-basher takes refuge in the closet

As this appears to be a cornerstone of her campaign, we'll put it real high so nobody misses it: Loren Loving Vail doesn't like gay people. Everybody got that? Good.

Despite earlier disavowals that she would do so, Vail, a Republican running for the 25th District seat in the Ohio Senate, has added gay-bashing to the repertoire of right-wing, neo-numbskull tactics she is employing in her increasingly distasteful campaign against Democrat Eric Fingerhut.

Her latest eruption came this week, when she got on her high horse about Lorain Catholic High School adding the words "born and unborn" to the end of the Pledge of Allegiance. Although Lorain is a long way form the East Side 25th District, Vail issued a news release defending the school's First Amendment rights and blasting "the minority far left individuals who attack those who want to return value consciousness and stability to their society."

Now, I'm all for the First Amendment, but I think Vail is a little confused. No one on the left, to my knowledge, was challenging the school's right to free speech. Representatives of both the American Civil Liberties Union and the National Organization for Women, in fact, defended that very right. Those who would outlaw the things with which they disagree more often that not come from Vail's end of the political spectrum.

This might have been just another example of an opportunistic candidate trying to get a little mileage out of a momentarily hot issue, but Vail also took the occasion to make another pitch for the homophobic vote, attacking the Gay People's Chronicle for a recent editorial criticizing Lorain Catholic and for a cartoon poking fun at Vail's "pro-values" campaign.

Calling the cartoon "obscene" (the neo-numbskulls toss that word around a lot, but this particular cartoon doesn't even come close), Vail couldn't resist noting in closing that her opponent "Mr. Fingerhut, and his far left agenda, is supported by (the Chronicles)."

Deja vu. Last June, Vail similarly interjected herself into the controversy over the speech governor's wife Dagmar Celeste gave to a gay group in Cincinnati. Although many, including myself, questioned the propriety of the language Celeste used in a public setting, Vail escalated it into an anti-homosexual diatribe, and again tried to nail Fingerhut on a guilt-by-association rap.

"Dear Media," she coyly added to the end of her June news release, "I have only heard, not read, that my opponent, Mr. Fingerhut, has been endorsed by the Gay People's Chronicle. Could you please check this out for Me? Thank you."

Well, maybe her strategy will work. Vail wouldn't be the first candidate to latch onto homophobia as a ticket to Columbus. She need look no farther than Parma, where Sen. Gary Suhadolnik has developed it into an art form. He's such an outspoken and vitriolic gay-hater you wonder what a psychiatrist would have to say about it.

The only thing I don't understand is why, when she was asked about the Dagmar incident during an interview at The Plain Dealer, Vail went to such lengths to deny any intention to use gay-bashing as a campaign tactic. Why, goodness no, she insisted, that was the farthest thing from her mind.

Of course, she could understand how someone reading her comments might have gotten that impression, but she's not the sort of person to take political advantage of prejudice and mindless hatred directed at a particular group of people. She certainly would be more careful in the future, she promised the folks here.

So much for promises. Having learned long ago never to underestimate the neo-numbskull vote, I won't hazard a guess on whether her hat-mongering will work.

But although I personally don't have much use for bigots of any sort, I have a particular problem with those who can't even be up front about it.

Honesty, it would appear, is one value on which Vail is not so "pro."

EXHIBIT B

[photograph] LOREN L♥VING VAIL
FOR OHIO SENATE 25TH DISTRICT

10-13-90
FOR IMMEDIATE RELEASE

"VAIL DEFENDS LORAIN CATHOLIC"

Loren Loving Vail, candidate for Ohio Senate 25th District, today defended Lorain Catholic High School's addition of the words "born and unborn" to the Pledge of Allegiance. Ms. Martha Pontoni, the head of NARAL in Cleveland, and editor of Gay People's Chronicle had attacked the school for "teaching young children that they do not have the right to decide over their own bodies."

Mrs. Vail said she too had recently been bashed by Ms. Pontoni for taking a pro-values stand in her campaign. Mrs. Vail had previously objected to the use of obscene speech in public by the Governor's wife. Then Ms. Pontoni's editorial page in The Gay Chronicle attacked Mrs. Vail with obscene speech in a political cartoon with the phrase, "Get a 'heart' on 4 Loving Vail." October, 1990 Vol. 6 Issue 4 Page 2.

It is time that citizens for decency and values stand up to the minority far left individuals who attack those who want to return value consciousness and stability to their society. Lorain Catholic's administration and students had an absolute constitutional right to add their human rights stand to the Pledge of Allegiance., said Mrs. Vail a civil rights lawyer. Contrary to Ms. Pontoni's remarks, the school was legally correct to teach their children that liberties and rights attach to human life in our society.

We live in a contradictory society that attacks the decent, value conscious speech we would want our children to learn. Instead it allows freedom of expression to obscene, pornographic "art" for our children to visualize. Where are the leaders of this land who have the strength of character and courage of convictions to say that Pontoni's actions are wrong? Mrs. Vail said she will always demand ethical accountability from government when she is elected Senator from the 25th District.

Mrs. Vail encouraged all Catholic parents to unite and stand strong against this attack on their children's constitutional right to freedom of speech. Our parochial schools are certainly a bastion of values education in our society, and must be protected and encouraged.

Finally, Mrs. Vail noted that her opponent Mr. Fingerhut, and his far left agenda, is supported by Ms. Pontoni.

Paid For By Vail For Senate Committee,
M. Trentanelli, Secretary, (216) 432-1132,
139 Chatham Way, Mayfield Hts. Ohio 44124

EXHIBIT C

{Letterhead omitted in printing}

October 22, 1990

AN OPEN LETTER TO PLAIN DEALER READERS

On October 19, 1990, front page of Metro, Joe Dirck* called me a "bigot, a neo-numbskull, and a gay-basher and a hate-monger" because of the following release I had written in defense of Lorain Catholic. Please note that my release had never been published by The Plain Dealer before he wrote his column.

Joe Dirck wrongfully twisted and perverted the truth and the intent of my press release. His type of "journalism" is irresponsible and inexcusable. You the reader should have had the opportunity to read the release and formulate your own intelligent opinions. Because of Dirck's malicious attack, I requested that The Plain Dealer provide "equal time and fairness" and print my release but they refused. Hence my campaign has had to pay for its publication so that you readers will be able to read "the other side" of the story.

I urge you readers to demand honesty, fairness, and truthfulness from "values-bashers" such as Dirck.

*Dirck is married to Mary Anne Sharkey, Director of the Plain Dealer Editorial Page. Last June it was Ms. Sharkey's column that had attacked me for opposing Dagamar Celeste's obscene speech.